IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2)(b)

Description of the case

Criminal Reference No. 2 of 2004
Criminal Appeal No. 45 of 2004
Criminal Appeal No. 46 of 2004

Date of decision: October 06, 2004.

For the Approval of:

Hon'ble Chief Justice V.S.Sirpurkar

Hon'ble Mr. Justice Irshad Hussain

-Whether the order/judgment should be sent to the reporters for reporting? (Yes)

-Whether the reporters be allowed to see the judgment? (Yes)

A

RESERVED

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Reference No. 2 of 2004

S T A T E

Versus

Liyakat s/o Gulami
R/o Maharajpur Khurd,
Police Station Laksar,
District Haridwar ..... Accused

WITH

Criminal Appeal No. 45 of 2004

Liyakat ..... Appellant

Versus

State of Uttaranchal ..... Respondent

AND

Criminal Appeal No. 46 of 2004

Smt. Zaheera w/o Liyakat..... Appellant

Versus

State of Uttaranchal ..... Respondent

.....

Mr. K.S.Verma, learned counsel for the Appellants
Mr. U.P.S.Negi, learned counsel for the State.

Coram: Hon. V.S.Sirpukar, C.J.
Hon. Irshad Hussain, J.

Dated: October 06,2004.

[Per Hon'ble the Chief Justice]

1. This judgment will dispose of Criminal Reference No.2 of 2004, Criminal Appeal No. 45 of 2004 and Criminal Appeal No. 46 of 2004.

2. Criminal Appeal No. 45 of 2004 is filed by accused Liyakat, while Criminal Appeal No. 46 of 2004 is filed by

accused Zaheera, Reference is necessitated as the Additional District and Sessions Judge / First Fast Track Court, Hardwar, has awarded death sentence to accused Liyakat. He also awarded sentence of imprisonment for life to accused no. 3 Zaheera. Both of them were convicted under section 302 I.P.C. as also under section 201 I.P.C., while accused no. 2 and 4, namely, accused Riyasat and Jeewani were acquitted.

3. Shortly stated, prosecution case was that accused no.1 Liyakat, original accused no.2 Riyasat, accused no.3 Zaheera and original accused no.4 Jeewani resided in a common house. Liyakat and Riyasat, accused no.1 and 2, are the real brothers, while Zaheera, accused no.3 is the wife of accused no.1 Liyakat. Jeewani, accused no.4, now acquitted, is the mother of accused Liyakat and Riyasat and mother-in-law of accused no.3 Zaheera.

4. Gulami owned the house, where as per prosecution case Liyakat, Riyasat and Jeewani used to stay separately. First charge against the accused persons was that they committed murder of Noor Alam, child aged about 1 1/2 years. They commonly intended to commit murder and did commit murder of a child- Noor Alam. The other charge was under section 201 I.P.C. that they buried the body of a child with an idea to screen their criminal act. As has been stated, accused no. 2 and 4, namely, Riyasat and Jeewani, have already been acquitted.

5. Prosecution story is in a very narrow compass. Noor Alam was child of P. W. 1 Rashid and his wife P.W.2 Nasreen. P. W. 1 Rashid and P. W. 2 Nasreen used to reside in the neighbourhood of Jeewani, original accused

no. 4. On the fateful day i.e. on 12th day of January, 1999, Nasreen was sitting alongwith her child in the courtyard of Gulami's house, who is husband of original accused no.4. Jeewani. At that time Zaheera, Jiwani, Liyakat and Riyasat were also there. Her husband Rashid, P.W.1 came there and asked his wife to go with him to feed fertilizer to the standing crop in the field. However, Nasreen declined to go with him as there was nobody to lookafter Noor Alam. Hearing this, Jeewani and other accused persons told that they will lookafter the child and she could leave the child with them. P.W.3 Brahm Pal and one Rishipal were also there at that time. The child was left by Nasreen with the accused persons and she left the place alongwith her husband. When both of them returned at about 4 O'clock, they straightaway went to the house of Gulami and enquired about Noor Alam. Accused told them that Noor Alam was playing in the vicinity only. However, they could not find the child. They searched for the child for the rest of the day and night and even on 13th of January, 1999, but to no effect. However, in the morning of 14th, when Rashid was searching for child alongwith Brahmpal, Bhagwan and Yasin, they searched the house or hut of Liyakat and saw that in the northern corner of that hut, foot of small child was protruding out of the ground. Seeing this Rashid reached to the Police Station, Laksar and reported the matter.

6. A case was registered on that basis and the Incharge of the Police out-post (Chauki) was informed on wireless and receiving the message, O.P.Sisodia, P.W.8 with other officials reached in the house of the accused and in presence of the witnesses, body of Noor Alam, which was buried in the pit in the northern corner of the hut, was recovered. *Panchnama* and other formalities were

completed and on that very day all the accused persons came to be arrested.

7. The prosecution relied on eight witnesses. They being the parents of the child P.W.1 Rashid and P.W.2 Nasreen and two other witnesses P.W.3 Brahm Pal and P.W.4 Rishipal. They all supported the prosecution story. Besides them, P.W.6 Dr. R.K.Pande is the medical officer, who had conducted post mortem on the dead-body and P.W.7 Rishipal and P.W.8 O.P.Sisodia are the police witnesses.

8. The defence of the accused was of plain and simple denial, though there was a halting defence of alibi on the part of zaheera, accused no.3, appellant herein.

9. The trial Court accepted the case of the prosecution in part. He held that there was no offence proved against the accused no.2 Riyasat and accused no. 4 Jeewani. However, the offence was proved against the appellants. The conviction of two accused, namely, Liyakat and Zaheera and death sentence awarded to accused no.1 Liyakat have occasioned these appeals and reference.

10. Mr. K.S.Verma, learned counsel for the appellants, has very severely assailed the judgment of the trial Court. According to him, the finding of the trial Court that the place from where the child's dead body was recovered, exclusively belonged to Liyakat was itself not proved. The learned counsel further says that there was absolutely no motive as the relations between Rashid on the one hand and accused on the other hand, were absolutely cordial and, therefore, there was no question of small child, like Noor Alam being murdered by the accused or any one of

them. Learned counsel pointed out that in fact it was also not proved that the child was given in custody of the accused persons and more particularly to accused Zaheera. According to learned counsel, whole approach of the trial Court was faulty in so far as the appreciation of the evidence was concerned and the trial Court failed to see that the most important witnesses were not examined by the prosecution and those who were examined, were hardly of any assistance in proving the guilt of the accused persons. Learned counsel also urged that the trial Court had committed grave mistake of accepting the evidence against two convicted accused, while discarding the same evidence against the other two accused persons and thus the trial Court had ignored the basic principle of appreciation of evidence that the evidence has to be measured with the same yard-stick. Lastly, learned counsel has urged that the death sentence was wholly disproportionate. In fact, the learned counsel pleaded for complete acquittal.

11. As against this, Mr. U.P.S.Negi, learned Public Prosecutor supported the judgment and pointed out that this was a case depending upon circumstantial evidence, wherein chain of circumstances was complete and each of the circumstances was proved beyond hilt and there was no scope for coming to any other conclusion except the guilt of accused. He pointed out that the child, who was not even a toddler, was given in the custody of the accused persons and more particularly accused no.3 Zaheera and, therefore, it was incumbent on the part of the accused persons to give some explanations, if barely within three hours the child disappeared from their custody and ultimately was found dead. He pointed out further that no such explanation has been provided. On the hand, Zaheera has tried to

raise a defence of alibi. The learned counsel further pointed out that once the custody of the child was proved to be with the accused coupled with the circumstance that the child died unnatural death because of asphyxia, onus on the accused was all the more effected. Lastly, learned counsel pointed out that the most major circumstances was the finding of the child's body in the hut, which was in the exclusive possession of Liyakat, accused no.1 and Zaheera, accused no.3. Learned counsel submits that there is not one word by way of explanation. According to the learned counsel, though the burden never shifts, the onus did shift to the accused persons to explain these extremely grave circumstances, which were in their knowledge alone.

12. As regards the acquittal of the other accused persons, the learned Public Prosecutor submitted that the trial Court has given good reasons and has drawn clear cut line of distinction in between the convicted accused and acquitted ones.

13. On this back drop, it has to be seen as to whether the trial Court was right in convicting the accused.

14. There can be no dispute that the case entirely depends on the circumstantial evidence. The trial Court has not specifically culled out the circumstances against the two accused and has relied on the evidence of P.W.1 Rashid, P.W.2 Nasreen, P.W.3 Brahmpal, and P.W.4 Rishipal, firstly to hold that on the fateful day when the P.W.1 Rashid came to the house of Gulami, there in the Bugar (courtyard), accused persons were sitting and at that time, when P.W.1 Rashid asked his wife P.W.2 Nasreen to accompany him to the fields, she declined to do so on account of the child. The evidence of P.W.1 Rashid and

P.W.2 Nasreen is practically identical on this subject, and there is no challenge to the evidence of these two witnesses. After all, it has also come in the evidence that there was absolutely no strained relationship between P.W.1 Rashid and accused persons. There is no cross-examination worth the name on this issue either to P.W.1 Rashid or P.W.2 Nasreen. Both of them have deposed that in the early noon, when P.W.2 Nasreen was sitting alongwith accused persons, she was having the child and at that time at 1 O'clock Rashid came there and requested his wife to accompany him and she declined to go as there was nobody to lookafter the child. Both of them have specifically stated that the accused persons have said that the child could be left with them, and on that P.W.2 Nasreen left the child with the accused persons, more particularly he was given to Zaheera, accused no.3, appellant herein. It has come in the evidence of P.W.2 Nasreen that at that time even P.W.3 Brahmpal and P.W.4 Rishipal were also there and all of them were warning themselves. This witness is also supported by the evidence of P.W.3 Brahmpal and P.W.4 Rishipal.

15. We have seen the evidence of all these persons very closely. From these, the trial Court has deduced and in our opinion rightly, that on the fateful day the child was left in the custody of accused persons. Deceased Noor Alam was a toddler. All the witnesses have very clearly described that he could not walk and was merely a toddler and could only crawl. We have, therefore, no hesitation to hold and confirm the finding of the trial Court that on the fateful day, the child Noor Alam was left in the custody of four original accused persons, out of which two were the present appellants. In fact P. W. 1 Rashid went on to suggest that the child was given to Zaheera, original

accused no.3, This, in our opinion, is the first circumstances against the present two accused persons. True it is that other two accused were also there, they being Riyasat and Jeewani. However, we will come to that part lateron. The fact of the matter is that the present two appellants alongwith other acquitted accused persons had themselves suggested to P.W.2 Nasreen that the child should be left to their custody and the child was accordingly left in their custody.

16. The trial Court then noted, again rightly in our opinion, that at about 4 O'clock barely after three hours the child was given in the custody of accused persons, when the parents of the child returned from the field, the child was not to be found. Both the parents as also P.W.3 Brahmpal and P.W.4 Rishipal also support this theory that the child was not to be seen. The disappearance of the child within three hours from the custody of the accused persons would be the second circumstances in our opinion. There can be no dispute that once the child was left in the accompany of four accused persons to begin with. The trial Court on the examination of these four witnesses further came to the conclusion that the child was not found either on that day or even on the next day. It has come in the evidence of the four witnesses that the parents of the boy and these two witnesses and some others, searched for the boy, but to no effect. There is nothing unnatural in this evidence also as the pange of the appellants would be most natural. So also, there is nothing to dispute the claim of other witnesses that they also searched for the boy without any success. At this juncture, when the parents of the dead child came and asked about the boy no explanation

was given by the accused or any one of them and they casually replied that the child must have been playing somewhere. This version of P.W.1 Rashid and P.W.2 Nasreen has also not been challenged. This non-explanation in our opinion is the third circumstances against the accused.

17. Ultimately, the dead body of the boy was found only on 14th and it was found from the hut of the accused no. 1 Liyakat and accused no.3 Zaheera, appellants herein. The witness Rashid P.W.1 has asserted in the first information report itself that when they took the search of Liyakat's house, his son Noor Alam was found buried on the southern side of the hut and that his one leg was visible. He asserted the same thing in his evidence and it is to be noticed that as soon as he saw the body of his son in accused Liyakat's hut, he has filed the first information report without any loss of time naming all the facts very specifically therein. To the same effect is the evidence of P.W.2 Nasreen that on the third day at about 8 O'clock when the search was made by the villagers, Noor Alam's body was found in the hut of accused Liyakat and his protruded leg was visible. P.W.3 Brahm Pal has also described that on the third day, the protruded leg of the boy was seen in the hut of Liyakat. He also says that the police came and dug out the body from the hut of accused Liyakat. Same is the claim of P.W.4 Rishipal as also P.W.5 Charan Singh, who has asserted that on the morning of 14.1.1999 at about 8 O'clock when they went to accused Liyakat's house, there were 50-60 persons present and that he saw the protruded leg of the body of child in the said room. This witness is a *Panch* witness and has signed on the *Panchnama* as such.

18. The evidence of P. W. 8 Om Prakash Sisodia, Investigating Officer is to the effect that after receiving information, he alongwith Devendra and Mubarak Ali went to Maharajpur Khurd in the house of Gulami and saw that the child was buried inside the hut and that his leg (*USKI EK TANG)* was visible. Very surprisingly, the Investigating Officer is silent about the said hut being that of Liyakat. According to him, however, no accused persons were present at the time when the dead body was recovered and he arrested them only lateron. He has spoken about the Panchnama Ex.5 and also sketch map and suggested that hut in which the body was found belonged to Gulami and the family of Gulami used to live there. However, none of them were present when the body was dug out. The Investigating Officer, P.W.8 O.P.Sisodia also asserted that P.W.1 Rashid had not told him that the room from where the dead-body of the boy was found belonged to accused Liyakat. We are really surprised at the casual manner in which the Investigating Officer has investigated the offence and further deposed in the Court. In fact, in the F.I.R. itself Rashid P.W.1 had very specifically mentioned that when accused Liyakat's house was searched, his son was found buried in the said hut. Rashid had also stated in his evidence to the same effect. In his cross-examination, it has come that the house of Riyasat and Liyakat were separate. The room of Jiwani was also separate. The house of Liyakat was facing east, while the house of Riyasat was facing south and the house of Jeewani and her husband Gulami was also facing east. In his cross-examination, he also again asserted that the body of the child was found under the roof of Liyakat's house. As if the insistence was not sufficient, in para 11 of his cross-examination, it has come that on the western side of that hut is the vacant land and thereafter road. The witness then described that there was

a *Kothi* in the said hut. There was same Ban (cord of twisted grass like material) over the dead-body. Very significantly, though the Investigating Officer has said in his cross-examination that P.W.1 Rashid has not stated to him in his statement that the said hut belonged to Liyakat, we do not find any such omission in the evidence of Rashid, nor was such omission brought out in his cross-examination. We are surprised that a question regarding the statement made by the witnesses to the police during the investigation, was permitted to come on the record. In fact the whole cross-examination of the Investigating Officer is only regarding the statement made by the witnesses to him without brining any contradiction or omission from the evidence of those witnesses. All kinds of inadmissible questions were not only permitted in the cross-examination, but were also taken on record. Therefore, we are not at all impressed by the evidence of the Investigating officer or so called admission in his evidence that P.W.1 Rashid had not told him that the hut where the body was found belonged to Liyakat. There is no cross-examination to P.W.1 Rashid, nor any suggestion that the hut where the body was found, was not that of Liyakat or it was of somebody else. All that has come in the cross-examination is that the said hut was of *Kutcha* construction and part of it was in a dilapidated condition. Very significantly it has been asserted by this witness in the cross examination that "इस कमरे में घर का सामान, चारपाई कपड़े आदि थे उस कमरें में पलंग व एक चारपाई थी। जब लाश निकली तो वे दोनों चीजें मौजूद थीं। पलंग, चारपाई लाश के दक्षिण के तरफ थीं। यह कहना गलत है कि मकान में चारपाई पंलग न हो व रहने का कोई सामान न हों।" English translation of this would be that 'there were domestic articles in the rooms, such as cot, clothes, etc, In the room, there was one bed and one cot. When the body was taken out, both the articles were there. Bed and cot

were on the southern side of the body. It is incorrect to say that in the house there was no cot and bed or no domestic articles.' This version in the cross-examination read with other evidence would suggest that firstly the hut belonged to Liyakat and he was residing there. This version has gone almost unchallenged. Needless to mention that this version has been fully supported by his wife P.W.2 Nasreen, P.W.3 Brahmpal and P.W.4 Rishipal, P.W.2 Nasreen has very specifically stated that the body was found in the house of Liyakat. She also described in her cross-examination that Liyakat's house rested on the earthen wall and there was a roof and that the wall was broken on the northern-western corner. She also insisted that in the hut from where the body was recovered a *Kutcha Kothi* (receptacle) is constructed. In her cross-examination, she says that from the portion where the wall was broken, nobody could come in. She also asserted that there were domestic articles in the same room or hut, where the body was found buried. Her version that the body was found in Liyakat's house and that there were domestic articles in that house, has not at all been shaken in the cross-examination. Similarly, her version that there were domestic articles in the room was also not shaken. Similar is the revision of Brahmpal, P.W.3, who insisted that the body was found in the Liyakat's hut in the northern-western corner. An omission was tried to be suggested regarding his not having told the Police that the body was found in Liyakat's hut. However, no such omission has been proved through the Investigating Officer - P.W.8 O.P.Sisodia. Very unfortunately, all kinds of questions were allowed to be put in and all inadmissible answers were allowed to go on record. He also gave the description of the house of Liyakat and had also suggested that there was a Kutchi Kothi (receptacle). There is absolutely no

challenge to this theory that the hut was that of accused Liyakat and that the same was in his use. He also asserted that besides the earthen *Kothi,* there was Ban (cord of twisted grass like material) as also cooking material (*Khane Pine ka Saman).* The evidence of Rishipal P.W.4 is not different. He also asserted that the body was found from Liyakat's house meaning the room or hut, as the case may be.

19. Though all the four witnesses were insisting that there were domestic articles and *Kothi* (earthen receptacle) in the room, P.W.8 Mr. O.P.Sisodia, Investigating Officer, however, asserted that there were no domestic articles in the room. It was after all a very small room and it could be possible that the Investigating Officer did not notice, the things due to the crowd having assembled there. However, we do not find any reason to disbelieve the four witnesses, when they said that the room had domestic articles, which would be suggestive of the fact that the room was is use and it was Liyakat's room. Much stress was given by Mr. K.S.Verma, learned defence counsel, on the evidence of the Investigating Officer and it was tried to be suggested that he had denied that there was any *Katch* or *Pucci* Kothi in the hut. However, we are not prepared to disbelieve the evidence of four witnesses, who had seen the *Kothi* in the hut.

20. This is apart from the fact that not a single witnesses was given suggestion that the hut did not belong to Liyakat at all. We are, therefore, convinced that the hut where the body was found was that of Liyakat and was in his user. This would be a very strong circumstance against Liyakat and his wife Zaheera, who would be naturally expected to be with her husband. The body was buried in the hut. It

was not as if in the hut there was a small pot-hole or a ditch and that the boy fell into that. All the witnesses are unanimous on the question that the body was buried and it was because of protruding of the leg that it was found. It is, therefore, the strongest circumstances that the boy, who was given in the custody of the accused persons, his dead-body was found buried in the hut, when was being used by these accused persons and was proved to be their won hut.

21. In this behalf, it is very significant to note that these accused persons are absolutely silent and there is really nothing by way of explanation either in their cross examination or in the examination under section 313, Cr.P.C. Beyond bare denial there is no explanation by either of the accused. The finding of the body of the boy in the buried condition in the hut of the accused, which was in his exclusive user, is the next circumstances against the accuse.

22. Similarly, the son explanation of this vital circumstances adds to the chain of circumstances. It is now settled law that if the deceased was in the custody or in the company of the accused, then the accused must supply some explanation regarding the disappearance of the deceased. The Supreme Court has taken a view in respect of the custodial death that the accused in whose custody the deceased was and met with death during that custody, must offer some explanation regarding the death. Of course, the death has to be unnatural and in 1992 (3) SCC 106 Ganeshlal Vs. State of Maharastra, this view has been highlighted by the Supreme Court. Similar view regarding the accused's liability to explain was taken by the Supreme Court in three other cases. They being 2002 (1) S.C,C. 731 Ganesh Lal Vs. State of Rajasthan; 2003 (1) S.C.C. 534 -

Sahadevan alias Sagadevan Vs. State represented by Inspector of Police, Chenni; and 2002 (7) SCC 157 Mani Kumar Thapa Vs. State of Sikkim. In one other case reported in 2000 (10)SCC 328 Damodar Vs. State of Karnataka, the Supreme Court took the view that where the body of the deceased was found buried in the house of the accused, even when it was not in his exclusive possession or was not possessed by the accused at that time, the accused must give some explanation. Very significantly, we find no explanation as to the death of Noor Alam from both the appellants, though child was not only in their custody, but they were also the persons who were seen last with the child, when the child was alive. There is also no explanation of the accused as to how the body was found buried in their hut. This non-explanation would find still another circumstance against both the accused persons.

23. In this behalf, we cannot ignore the medical evidence, which is also very vital in this case. Dr. R.K Pande, who was examined as the P.W.6 was the doctor, who conducted the post mortem on 14.01.1999 when he was attached to the hospital in Hardwar. He in his post mortem report has recorded that there was mud found on the whole body and the face had become yellow; that there was no injury on the body; however, the lungs were found swollen and congested and full of blood mixed froth; that the trachea was congested and had bloody froth in it; that there was 50 grams of whitish semi-digested food. The cause of death was stated to be asphyxia as a result of suffocation and that the death must have caused two days prior to the post mortem, which was held on 14.01.1999 at 3.15 p.m. Noor Alam, the deceased was a suckling child and his mother P.W.2 Nasreen has specifically stated so and we have no

reason to disbelieve that version. If she left at about 1 O'clock, it was obvious that she had fed the child because it was not expected of her to leave the child hungry. She also asserted in her evidence that at 4 O'clock, when she came back she had to feed the child again, this would suggest that unfortunately when the mother must have returned, the child must have been dead. This would be barely within 2-3 hours when she handed over the child to the appellants and two other accused persons. The version of the doctor as well as the post mortem report, would leave no doubt that the child died an unnatural death and it was only thereafter that the child came to be buried. It was tried to be suggested by Mr. K.S.Verma, learned defence counsel, that since there was no injury on the body of deceased Noor Alam, there was no question of our holding that the child died an unnatural death and that it could have been natural death also. However, if it had been an accidental death due to the falling down in the ditch, even there would have been at least some earth in the nostrils or trachea of the boy. The doctor did not find any such material in the post mortem examination. Our attention was drawn towards the last portion of the doctor's evidence in which he admitted as under:

> " यह केस hanging या throttling का नही है। मगर किसी कपड़े, टोपा या अन्य वस्त्र के नाक व मुंह में लिपटने से बच्चे का Suffocation होने से बच्चे की मृत्यु सम्भव है। इस केस में कोई Violence या मारपीट या चोट के निशान नहीं पाये गये।"

From this, the learned counsel tried to sugest that even if the child had died before being buried, it could have been possible by accident because those were the days of winter and the child was wearing a cap, *Paijamas,* a frock, a *Kurta* and a bush-shirt. Now, if the death was accidental and had taken place before the mother of the child

returned from the fields, there was absolutely no reason for the accused persons and more particularly these two accused (appellants), to behave in the way they behaved. There is one more reason why the medical evidence can be held against the accused persons. In his cross examination, the doctor says " भोजन पचने के लिये करीब 5–6 घंटे चाहिए। मृत्यु का समय जो मैंने बताया है, उसमें 6 से 8 घंटे का अन्तर आ सकता है". Now it is clear from this that the child was fed immediately before P.W.2 Nasreen, the mother of the child, left for the field. The subsequent version of the doctor goes more against the accused persons because if the child did not die before 4 O'clock and died subsequently i.e. after the mother returned, then there would be all the more reason for the accused to explain because search for the child had already begin at about 4 O'clock or so after the return of the parents from the field, an enquiry about the child was made from the accused persons only. Therefore, this version of the doctor goes against the defence than in favour of it and would all the more suggest that the death of the child was unnatural, and under the circumstances stated by us, homicidal. True it is that it is not a case of strangulation, but that is not the only way that the suffocation can be caused. Again, in the inquest report, there is nothing to suggest that the cap of *Topa* was wrapped around the nose or mouth. On the other hand, it is described therein that the mouth of the body was open. All this suggest that the death of the child was unnatural or homicidal. This would be the next circumstances against the accused.

24. We cannot at this stage ignore the defence evidence. D.W.1 Sahjad was examined by the defence. In his evidence, he contended that the father of the accused was resident of his village. He then suggests that Zaheera had

come to her father's place, where this witness lived, on 01.01.1999 and stayed thre till 15.01.1999 and that she had not gone to Maharajpur Khurd during this period. According to him, on 15.1.1999, the police came to his village and arrested her and that she was falsely implicated. In his cross-examination, the witness had to admit that he did not know as to from where the body of the boy was found and whether the boy was living or dead, when he was found. He asserted that he knew only about Zaheera's coming to the village and her being taken by the police. He also asserted that the Zaheera was married for five years and that she had no child. It was suggested to the witness and denied by him that because of the childlessness, Zaheera used to go to the persons knowing magic. In our opinion, the trial Court rightly disbelieved this witness, who had no reason to remember that Zaheera was in her father's place at that time when the incident happened. We are not impressed by the evidence of the witness at all whose testimony we have closely examined. This is apart from the fact that according to the Investigating Officer Mr. O.P.Sisodia, P.W.8, he had effected the arrest of the accused persons on 15.01.1999, while he was going to Maharajpur for investigation. According to him, he got information that these accused persons were coming from Niranjanpur and, therefore, he arrested them at the square of Maharajpur near the 'Ganna Centre; at about 10.30 a.m. There is no suggestion to his witness regarding Zaheera's arrest from her father's place at Aithel, nor has Zaheera's so stated in her examination under section 313, Cr.P.C. There is no evidence regarding the distance between Aithel and Maharajpur Khurd, where the incident took place. Under these circumstances, we are of the clear opinion that the trial Court was right in disbelieving that evidence. However, that would create

another circumstances, at least against the accused appellant Zaheera i.e. by raising a false defence of alibi.

25. The following incriminating circumstances are found against the accused-appellant.

(1) That the child Noor Alam was handed over in the custody of the accused persons at about 1 O'clock by the parents;

(1A) That the child was either a toddler or a crawling boy;

(2) That the child was missing barely within three hours after he was given in the custody of the accused persons;

(3) That there was no explanation given by the accused for the missing of the boy to the parents and they only casually replied that the child must have been playing somewhere else;

(4) That the dead-body of the child was found buried in the hut, which was in the use and occupation of the accused persons;

(5) That there is no explanation whatsoever as to how his body came to be buried in the hut of these accused persons;

(6) That the unsubstantiated defence raised by the appellant no.2 Zaheera suggesting the alibi, which could not be proved at all and has been rightly disbelieved by the trial Court;

(7) That the child died unnatural and homicidal death due to suffocation and that the child had died even before it was buried.

These seven circumstances, according to us, are the extremely telling. They complete the chain of circumstances and these circumstances or any one of them are not incompatible with the innocence of the accused. We

would not have ordinarily undertaken this task of culling out incriminating circumstances. However, this being a death sentence case and there being no such exercise on the part of the trial Court and these being the original proceedings of confirmation, we have undertaken this exercise.

26. However, learned counsel for the defence tried to persuade us by citing a few judgments. Learned counsel, however, still contended that it cannot be said that these two accused alone were responsible for the death. He pointed out that after all two other accused persons, namely accused no.2 Riyasat and accused no.4 Jeewani, were also present when the child was given in the custody of the appellants. He further says that the other accused persons have been acquitted on the basis of the same evidence, which has been used against the present two appellants. From this learned counsel says that it is not proved conclusively and beyond reasonable doubt that these appellants alone were responsible for the death of the child. It is true that the trial Court has acquitted the other two accused persons and that there is no appeal filed by the State against those accused persons. Their acquittal has, therefore, became final. However, in our opinion, that itself will not give any advantage to these appellants. The Apex Court has settled this law regarding the acquittal of the co-accused persons and its effect on the conviction of the appellants in a recent judgment in Vidhya Devi and another Vs. State of Haryana reported in (2004) 9 SCC 476 wherein it has been held that when ample material exists against the appellants, they cannot claim acquittal on the basis of the acquittal of others. In Sardar Khan Vs. State of Karnataka reported in (2004) 2 S.C.C. 442, the Apex Court has held similarly. This is apart from the fact that

there is an essential difference in the circumstances and there is a clear line of distinction in the case of the two acquitted accused and these appellants. What impresses us the most is the fact that the child's body was found buried in the house of these appellants, particularly in the portion which was in their exclusive user and occupation. This is a very vital circumstances, on which some explanation ought to have come. On the other hand we find that at least Zaheera accused no. 3, appellant herein, has raised a false defence, without giving any explanation whatsoever, that would make the chain of circumstances complete against the accused.

27. It was murmured by the learned defence counsel that the *Chaukidar,* who had dug out the body of the child, was not examined. We do not think that it is such a vital error on the part of the prosecution because even in absence of evidence of *Chaukidar,* the whole prosecution story was unfurled. We have, therefore, discussed the whole evidence in details. The learned counsel for the defence then placed reliance on the following rulings:

1. 2002 Criminal Appeal Reporter 55 (SC)- Sudama Pande and others Vs. State of Bihar
2. 1999 (3) Crimes (SC) 137 Mohd. Zahid Vs. State of Tamil Nadu
3. 2002 Criminal Appeal Reporter 542 (SC) Ashish Batham Vs. State of Madhya Pradesh
4. 1992 Crimes VI-(II) 644 Anant Bhujangrao Kulkarni Vs. State of Maharastra
5. 1994 (3) Crimes 611 - Budha Satya Venkata S.Rao and others Vs. State of A.P.
6. 2000 Criminal Appeal Reporter 120 - Mujeeb and another Vs. State of Kerala
7. 2000 Criminal Appeal Reporter 6 - C.K.Reveendran Vs. State of Kerala
8. 2004 (2) Judicial Interpretation on Crimes 43 (SC) Wattan Singh and others Vs. State of Punjab
9. V-1994 Crimes (2) 154 L/nk Meharaj Singh/Kalu Vs. State of Uttar Pradesh

We have very carefully seen all these cases and in our opinion, none of the cases factually come any way near the present facts. Even the legal principles stated in the same have no application.

28. In the first mentioned case - Sudama Pande and others Vs. State of Bihar, what is stated is that each and every circumstance must be established clearly by reliable and clinching evidence. The Supreme Court in this case found that the presence of the accused persons in the vicinity could not by itself raise suspicion as the appellants belong to the same village. The evidence regarding teasing of murdered girl Guria was also not found substantiated. We do not think, therefore, that this case would be of any consequence.

The second decision (Mohd. Zahid Vs. State of Tamil Nadu) has been relied upon to suggest that sufficient weightage should be given to the evidence of the doctor. We do not think that the decision is of any help in this case because we have accepted the evidence of the doctor that the child has died due to suffocation. We have also considered the evidence of doctor in detail.

The third mentioned decision (Ashish Batham Vs. State of Madhya Pradesh) was relied upon by the learned counsel to suggest that last seen evidence was disbelieved by the Supreme Court, though the accused-appellant was seen entering and leaving the house of the deceased by two witnesses in morning hours. The chain of circumstances also not held to be complete in this case by the Supreme Court. The Supreme Court found serious infirmities and illegalities in the prosecution version. We have already shown that there were no such discrepancies in our case. Therefore, the case is of no use to the defence.

The fourth mentioned decision (Anant Bhujangrao Kulkarni Vs. State of Maharastra) was relied upon to suggest that the Supreme Court had refused to convict the accused only on the basis of last seen theory and circumstances of the dead-body being found near the residential portion of the house. We have already found out here in this case that the dead body was found not near the residence but in the residence itself, that too buried. The case is clearly different on facts.

The next decision in Budha Satya Venkata S. Rao's case was reiterated as in that it was found that there was no motive and the medical evidence was inconclusive in fixing the cause of death. It is true that the motive evidence is not there, though it has been suggested to the defence witness in the cross-examination that accused Zaheera was childless inspite of her five years of marriage and she used to go to the persons knowing black magic. The only other circumstance in that decision, which was relied upon was that the medical evidence was inconclusive regarding the death that is not the case here. The doctor has clearly suggested that the death is due to suffocation and we have already held that the said suffocation was not accidental. Therefore, this judgment is also of no use.

The next decision Mujeeb and another Vs. State of Kerala is again on the circumstantial evidence and chain of circumstances. On facts this case are entirely different, though there could be no question about the prosecution's liability to prove each incriminating circumstances to be proved to the hilt and then forming the chain of circumstances. We have already given our finding in this issue in the earlier part of the judgment.

The next case is that of C.K. Reveendan Vs. State of Kerala, which is on entirely different facts. Here, the medical had failed to suggest that the death of the deceased

was homicidal. We have already held that in this case the death was bound to be homicidal. In the case of Reveendran, a young lady was murdered, who was taken in a jeep. The Supreme Court refused to accept the circumstances, which were suggested to be incriminating circumstances. Such is not the case here.

The next decision is of Wattam Singh and others Vs. State of Punjab, where the accused persons were found guilty of offence punishable under section 201 and 306 I.P.C. on the basis of their presence on the cremation ground and also in the house of the accused husband, and the mere presence at the house or cremation ground was not held to be incriminating. Perhaps, the suggestion was given by the learned counsel that the mere presence of two appellants would not by itself be incriminating. This was not a case of mere presence near the dead body, but the dead-body was found to be buried in the house of the accused persons. That would make all the difference. Therefore, the decision is of no help.

Lastly in Meharaj Singh's case, the Supreme Court noted the vital omission in the inquest reports and the unnatural conduct of the eye witnesses and also observed the appellants were convicted on account of misguided suspicion. That is not the case here. We have given our careful consideration in this case and we have come to the conclusion that the evidence in this case was sufficient enough to prove the offence beyond reasonable doubt.

29. Thus, it will have to be held that the judgment of the trial Court is correct in so far as the conviction of the appellants for the offence under section 302 and 201 I.P.C. is concerned. The question, however, is of the sentence.

30. The trial Court has chosen to give extreme punishment to appellant Liyakat. It is undoubtedly true that the child whose custody was entrusted to the accused with great confidence has been murdered mercilessly. It is also true that it was an innocent sweet child, who died extremely an untimely death. However, in our opinion, the case does not come in the category of the 'rarest of rare' cases. The reliance of the learned trial Court on the reported decision in Ratan Gaud Vs. State A.I.R. 1959 SC 18 is uncalled for because at that time, the law on death sentence was not developed as it is today. Then, the death sentence was rule and life sentence was an exception. Similarly, reliance on the another reported decision in Parveen Kumar Versus State 2003 (12) All India Cases 813 is also uncalled for as the facts are completely different. That was a case of quadruplicate murder. The trial Court has committed the same error in relying upon the decisions in Dilip Kumar Sharma Vs. State - AIR 1976 SC 133; Ramjah Asari Vs. State - AIR 1977 SC 2102, State Vs. Balak Ram- AIR 1974 SC 2165; State Vs. Bishan Das- AIR 1975 SC 573; State Vs. Mohindra Singh AIR 1973 SC 697; State Vs. Thankur Das AIR 1978 SC 1, State Vs. Suresh - AIR 1975 SC 783 and number of other cases.

31. Barring Paras Dass Yadav Vs. State reported in AIR 1987 SC 955 and Asharfi Lal and sons Vs. State reported in AIR 1987 SC 1721, all the cases are decided prior to the celebrated decision of Supreme Court in the case of Bachan Singh Vs. State of Punjab reported in AIR 1980 SC 898 and even the facts in these two cases do not come anyway near the facts of the present case. In our opinion, the reference to the Law Commission's 35th Report was completely uncalled for. We also do not understand as to on what basis does the trial Court say that in committing the

murder of Noor Alam, major part was of accused Liyakat. In fact, there is hardly any reason to differentiate between the two accused persons. We are of the clear opinion that this is not a case where the extreme punishment was required to be given.

32. The accused persons are poor. That is apparent from the fact that they live in a hut. Though the motive is not proved, it could be a murder out of the superstitious, as at least till that time Zaheera was described to be childless inspite of five years of marriage. They come from the low strata of the society and there is no criminal record against them. Therefore, it cannot be said that the two accused persons have no scope to cast away their criminal frame of mind. Under these circumstances, we are of the clear opinion, that the sentence of death awarded was completely uncalled for. We accordingly refuse to confirm the death sentence awarded by the trial Court to appellant Liyakat, instead convert the same into imprisonment for life. Very strangely, the trial Court while awarding the death sentence to Liyakat has also fined him of Rs. 1000/-. We set aside that sentence of fine. The trial Court has also convicted both the appellants for the offences under section 201 I.P.C. read with section 34 I.P.C. and sentenced them to seven years R.I. and fined them of Rs. 1000/- each. In our opinion, the sentence of fine to both the appellants is unnecessary and is set aside.

33. The trial Court has directed the sentences to run concurrently in case of Zaheera. We made the sentence concurrent is case of Liyakat also.

34. Accordingly Criminal Appeal no. 45 and Criminal Appeal No. 46 of 2004 are dismissed so far as the

conviction is concerned. We partly allow the Criminal Appeal no. 45 of 2004 by substituting the sentence of imprisonment for life in place of death sentence in case of appellant Liyakat.

35. In view of the above, we refuse to confirm the death sentences and answer the Criminal Reference no. 2 of 2004 accordingly.

(V.S.Sirpurkar, C.J.)

(Irshad Hussain, J.)

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